

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

THE HIPSAVER COMPANY, INC.,

Plaintiff,

V.

J.T. POSEY COMPANY,

Defendant.

Civil Action No. 05-10917-PBS

**RESPONSE OF J.T. POSEY COMPANY TO HIPSAVER'S EMERGENCY MOTION
TO WITHDRAW SUPPLEMENTAL REPORT OF ROY J. EPSTEIN AND FOR
TELEPHONE CONFERENCE WITH THE COURT**

In response to HipSaver’s Emergency Motion To Withdraw Its Supplemental Expert Report And For Telephone Conference With The Parties To Discuss HipSaver’s Request For A Brief Opportunity For Further Supplementation (Docket No. 280), J.T. Posey Company (“Posey”) states as follows:

1. Posey does not oppose HipSaver's "withdrawal" of the supplemental report of Roy Epstein ("Epstein") (with the understanding that the report still may be used in cross-examination of Epstein at trial).
2. As the Court noted in its summary judgment ruling, "HipSaver will not be permitted to grab a pocketful of Posey's profits without some evidence linking the false advertisements to HipSaver's allegations of injury." Memorandum and Order dated May 15, 2007, at 31. In view of HipSaver's voluntary withdrawal of the supplemental report, HipSaver now has no proffer of evidence supporting its claimed damages, as required by the Court's ruling. Accordingly, Posey requests that the Court enter summary judgment in its favor.

3. Posey opposes HipSaver's request for additional time to the close of business on June 4, 2007, to provide a "revised supplemental report." In essence, HipSaver proposes to proffer a new damages theory less than one week before trial. HipSaver has already:
 - (a) delayed in producing its 2006 sales data, which were ordered to be produced yesterday and as of this writing still have not been produced;
 - (b) indicated that it will not produce 2006 invoices, as ordered by the Court, but will instead produce only some summary data; and
 - (c) offered its damages witnesses for deposition only on June 8, the last business day before trial.

HipSaver has had two years to come up with a viable damages theory, but has been unable to do so. HipSaver seeks to present a moving target and to have trial by ambush. HipSaver's continued delays are causing substantial prejudice to Posey as it endeavors to prepare for HipSaver's ever-changing damages claim, and should not be countenanced.

4. Posey's lead counsel Jeffrey Sheldon is unavailable for a conference call today, May 31, because he is engaged in an all-day mediation in California. Accordingly, if the Court wishes to convene a conference, Posey respectfully requests that it be scheduled for tomorrow, June 1.

J.T. POSEY COMPANY

By its attorneys,

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May 31, 2007

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of electronic filing and paper copies will be sent to those indicated as non-registered participants on May 31, 2007.

/s/ Anthony J. Fitzpatrick
Anthony J. Fitzpatrick

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